Hairul Din bin Zainal Abidin v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO W–05–8 OF 2001
MOKHTAR SIDIN, MOHD SAARI AND ABDUL AZIZ MOHAMAD JJCA
23 SEPTEMBER 2003

Criminal Law — Dangerous Drugs Act (Malaysia) — ss 6, 39A(2) — Drug possession — Difference in weight of drugs satisfactorily explained — Difference due to higher gross weight found by police and lower nett weight found by chemist — Lower nett weight stated in charge against accused — Whether difference a material discrepancy — Whether benefit of doubt given to accused

The appellant was convicted by the High Court on an amended charge of drug possession under s 6 of the Dangerous Drugs Act 1952 ('the Act') punishable under s 39A(2) thereof. He was sentenced to ten years' imprisonment and ten strokes of the rotan. He appealed against both conviction and sentence. On appeal counsel for the appellant argued that: (i) the appellant should be punished under s 6 rather than under s 39A(2) since the actual weight of the drugs was not established; (ii) there was a material gap in relation to the weight of the drugs found in the possession of the appellant. The weight of the drugs as weighed by the police was 26g more than as weighed by the chemist. The charge against the appellant stated the weight of the drugs to be 953.2g — the weight established by the chemist.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) The trial judge knew of the difference in weight and had explained the difference in his judgment. The drugs weighed by the police was weighed with masking tape wrapped around the drugs whereas the drugs weighed by the chemist was weighed without the masking tape. The 26g difference was due to the weight of the masking tape. In fact, the appellant was given the benefit of the doubt when the weight stated in the charge was the lesser weight (see paras 10–11).

(2) Even with the lesser weight, the amount of drugs in the appellant's possession far exceeded the prescribed amount under s 39A(1)(f) of the Act which is 50g. There was therefore no merit in counsel's submission and the trial judge was right in sentencing the appellant under s 39A(2) of the Act (see para 11).

(3) The trial judge correctly applied the principles of sentencing in sentencing the appellant. No new issue was raised in mitigation on appeal. Thus, there was no ground for the Court of Appeal to disturb the sentence imposed by the trial judge (see para 13).

[**Bahasa Malaysia summary**

Perayu telah disabitkan oleh Mahkamah Tinggi atas pertuduhan pindaan memiliki dadah di bawah s 6 Akta Dadah Berbahaya 1952 ('Akta tersebut')

yang boleh dihukum di bawah s 39A(2). Beliau dijatuhkan hukuman penjaran sepuluh tahun dan sepulun sebatan rotan. Beliau merayu terhadap kedua-dua sabitan dan hukuman. Semasa rayuan, peguam bagi pihak perayu telah berhujah: (i) perayu sepatutnya dihukum di bawah s 6 dan bukan di bawah s 39A(2) memandangkan berat sebenar dadah tersebut tidak dibuktikan; (ii) terdapat jurang yang material berkaitan berat dadah yang ditemui berada dalam milikan perayu. Berat dadah yang ditimbang oleh polis adalah lebih 26g daripada yang ditimbang oleh ahli kimia. Pertuduhan terhadap perayu menyatakan berat dadah sebagai 953.2g — berat yang dibuktikan oleh ahli kimia.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Hakim perbicaraan mengetahui perbezaan berat tersebut dan telah menjelaskan perbezaan tersebut dalam penghakiman beliau. Dadah yang ditimbang oleh polis telah ditimbang dengan pita penutup yang melilit dadah tersebut manakala dadah yang ditimbang oleh ahli kimia tidak ditimbang dengan pita penutup. Perbezaan 26g tersebut disebabkan oleh pita penutup tersebut. Bahkan, perayu tidak berasa sangsi apabila berat dalam pertuduhan tersebut adalah lebih kurang (lihat perenggan-perenggan 10–11).

(2) Walaupun dengan berat yang lebih kurang, jumlah dadah dalam milikan perayu masih melebihi jumlah yang ditetapkan di bawah s 39A(1)(f) Akta tersebut iaitu 50g. Oleh itu tiada merit dalam hujah peguam dan sememangnya hakim perbicaraan betul dalam menjatuhkan hukuman perayu di bawah s 39A(2) Akta tersebut (lihat perenggan 11).

(3) Hakim perbicaraan telah dengan betul menggunakan prinsip-prinsip penghukuman dalam menjatuhkan hukuman ke atas perayu. Tiada persoalan baru yang ditimbulkan dalam mitigasi semasa rayuan. Oleh itu, tiada alasan untuk Mahkamah Rayuan campur tangan dalam hukuman yang dikenakan oleh hakim perbicaraan tersebut (lihat perenggan 13).]

Notes

For case on the Dangerous Drugs Act 1952 ss 6, 39A(2), see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) para 147.

Legislation referred to

Dangerous Drugs Act 1952 ss 6, 39A(1)(f), (2), 39B

Appeal from: Criminal Trial No 45–46 of 2000 (High Court, Kuala Lumpur)

Gobind Singh Deo (Karpal Singh & Co) for the appellant.

Shahrizal bin Shaari (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Mokhtar Sidin JCA (delivering judgment of the court):

[1] The appellant in this appeal appealed against the sentence imposed by the High Court for an offence under s 6 of the Dangerous Drugs Act 1952 ('the Act') and punishable under s 39A(2) of the Act. The appellant was originally charged in the High Court under s 39B of the Act but at the close of the case for the prosecution the learned trial judge amended the charge to one under s 6 of the Act. The appellant was sentenced to ten years imprisonment from the date of his arrest and also ten strokes of the rotan after he elected to remain silent when the amended charge was read to him.

[2] The facts as stated by the learned judge were, on 16 June 2000, Chief Inspector Yap Huat Tian led a police party to a flat number Block 4, Desa Tun Razak, Sungei Besi, Kuala Lumpur. At about 11.15pm, Chief Inspector Yap Huat Tian who was at a higher floor of the flat saw the appellant walking towards the lift. Chief Inspector Yap Huat Tian then instructed Lance Corporal Lim Hee Jiang and Corporal Romli to arrest the appellant. Chief Inspector Yap Huat Tian then came down to the ground floor. When he reached the ground floor he saw that the appellant had already been arrested by Lance Corporal Lim Hee Jiang and Corporal Romli. Lance Corporal Lim Hee Jiang gave evidence that when he and Corporal Romli identified themselves as police officers the appellant attempted to run away.

[3] When Lance Corporal Lim arrested the appellant, he took possession of a white plastic bag with the word 'Starmart' which the appellant was holding. Lance Corporal Lim then handed over the plastic bag to Chief Inspector Yap. Chief Inspector Yap opened the plastic bag in front of the appellant and inside it, Chief Inspector Yap found a packet wrapped in old newspapers.

[4] In the packet, Chief Inspector Yap found some plant materials wrapped with masking tape which he suspected to be cannabis. After analysis, the chemist confirmed the plant materials to be cannabis weighing 953,2g. At the close of the case for the prosecution, the learned counsel for the appellant submitted that the prosecution failed to make out a prima facie case against the appellant based on two grounds:

(i) the prosecution failed to prove the weight of the dangerous drugs; and

(ii) in a case of trafficking, as in this case, knowledge of possession of the dangerous drugs must be proved by direct evidence.

[5] The learned judge found that there was no merit on the first ground submitted by the appellant's counsel but upheld the second ground raised by. the appellant's counsel in that the prosecution failed to prove by way of direct evidence that the appellant had knowledge that in his possession, was the drug 'cannabis'. Even though there was evidence to show that the appellant attempted to run at the time of his arrest, that was not sufficient to show that he had knowledge of the drug.

[6] In his judgment, the learned judge stated that the evidence by the prosecution proved that the appellant had only possession of the cannabis

to which the appellant's counsel conceded. The learned judge then proceeded to amend the charge against the appellant to one under s 6 of the Act punishable under s 39A(2) of the Act. When the amended charge was read to the appellant he claimed trial to the amended charge. After the three alternatives were read and explained to him, the appellant elected to remain silent. The learned judge then found the appellant guilty of the amended charge and convicted the appellant.

[7] In mitigation, the appellant's counsel submitted that the appellant was 27 years of age at the time of the trial and unmarried. The learned deputy public prosecutor stated that the appellant had no previous convictions but pressed for a deterrent sentence in view that the amount of cannabis found to be in the possession of the appellant was 26 times more than the permissible limit.

[8] The learned judge then sentenced the appellant to ten years imprisonment and ten strokes of the rotan.

[9] Being dissatisfied with that decision the appellant appealed to this court against his conviction and sentence. Before us, the learned counsel for the appellant submitted that the amended charge against the appellant was under s 6 of the Act, and as such he should be punished under the same s and not under s 39A(2) of the Act. The punishment under s 6 of the Act is a fine not exceeding RM20,000 or an imprisonment not exceeding five years or both. The appellant's counsel submitted that the weight of cannabis found by the chemist was different from the weight found by the police. As such, there was a material gap as to the weight of cannabis found to be in the possession of the appellant. The appellant's counsel submitted further that the onus of proof was on the prosecution to prove the actual weight of cannabis found to be in the appellant's possession. Failure by the prosecution to do so would warrant the benefit of doubt be given to the appellant. Since the actual weight of cannabis was not proved the punishment to be imposed on the appellant should be under s 6 and not under s 39A(2) of the Act. In this respect, the learned trial judge in his judgment stated:

> With regard to the first objection raised by learned counsel it was his contention that the weight of the dangerous drugs as found by PW2 was different from that stated in the chemist report. He said that this means the evidence advanced by the prosecution in relation to the weight of the dangerous drugs is contradictory and unsatisfactory and as such ought to be rejected. This submission is answered by the evidence of PW2 who having said that there was a difference in the weight of the dangerous drugs as weighed by him and as stated in Exhibit PI6 said in re-examination that he weighed the dangerous drugs together with the masking tape. It must, however, be observed that the weight referred to in exh P16 is the 'berat bersih'. That explains the difference in the weight of the dangerous drugs as weighed by PW2 and the chemist. Surely, the nett weight of the dangerous drugs must be different compared to its weight when weighed with the masking tape. It follows that the difference in weight must be due to the weighing of the exhibit by PW2 together with the masking tape. In any event, the evidence of PW2 clearly establishes that the whole of the dangerous drugs that he received was sent to the chemist for analysis. He was not cross-examined in any way on this issue. What therefore PW2 and the chemist weighed was the whole of the dangerous drugs seized …

[10] It is clear from the above passage that the learned trial judge knew of the difference in weight and he explained why there was a difference in weight in that the weight taken by PW2 included the masking tape while the weight given by the chemist was the weight of the cannabis alone without the masking tape. As can be seen, the difference in weight was 26g which would be the weight of the masking tape. I see no fault in the explanation given by the learned judge and I could not find any reason not to accept the explanation given by him.

[11] The weight of cannabis stated in the charge was 953.2g which was the nett weight of cannabis as found by the chemist. The weight as found by PW2 would be 26g more than the 953.2g as stated in the charge. In my view, the appellant was given the benefit of the doubt when the weight stated in the charge was the lesser weight. Even with this lesser weight the cannabis found to be in the possession of the appellant far exceeded the prescribed weight of cannabis under s 39A(l)(f) which is 50g. I see no merit in the submission of the appellant's counsel. The learned judge was right in amending the charge where the punishment should be under s 39A(2) of the Act.

[12] In respect of the appeal by the appellant against the sentence imposed by the court, I would only have to refer to the judgment of the learned trial judge where he stated:

> In his plea in mitigation, learned counsel merely said that the accused is aged 27 and is unmarried. The learned Deputy Public Prosecutor informed the Court that the accused had no previous convictions and prayed for an appropriate sentence as the weight of drugs involved in this case is about 20 times more than the prescribed limit. It is settled law that any sentence to be passed must be a balance between the public interest to be served and the interests of the person to be sentenced. The manner in which public interest is affected by drug abuse has been appropriately dealt with in *PP v Loo Choon Fatt* [1976] 2 MLJ 256. The position is the same, if not worse, today (see *Ang Chai Seng v PP* [2000] 2 MLJ 35). The seriousness of the drug menace must therefore be reflected in the sentence to be passed so that the requirements of public interest can be served effectively. At the same time it must be realized that the proper sentence for each drug offence depends on its own peculiar circumstances. It has been held that the weight of the drugs found on a person plays a significant role in assessing the appropriate sentence (see *Zaidon Shariff v PP* [1996] 4 CLJ 441). In this regard I refer to *PP v Tia Ah Leng* [2000] 5 MLJ 401 where I had the occasion to say at p 412:
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> > 'As the penalties for drug offences under the Act vary dependent on the weight of drugs involved the imposition of the maximum sentence in a particular case will be guided by the weight though it cannot be the yardstick in all cases. In saying this I refer to *R v Laurentiu and Bechru* (1992) 63 A Crim R 402 where Wood J observed that it is not entirely appropriate to place too much emphasis on the precise quantity of the drug involved, because in some cases the possession relates to that of an intermediary of principal in the course of an enterprise that is judged particularly criminal, whereas in other cases the possession may be that of the end user. Be that as it may, I must immediately observe that these mitigating circumstances may be displaced in a particular case where the quantity of drugs involved is large. This is because quantity can in fact supply evidence of motive (personal need versus greed), degree of involvement, and potential for damage to

community as well as being an indicator of the gravity of the offence (see *Sentencing: State and Federal Law in Australia* (2nd Ed) by Fox and Freiberg p 1009). A claim of possession for mere personal consumption may also be not sustainable if the street value of the drugs is disproportionate to the financial standing of an accused. The mitigating effect of merely being an intermediary may also be weakened if the quantity of drugs is large thereby indicating active involvement in the enterprise. The absence of any of these circumstances in favour of an accused would be an indication of his heinous intention and thereby militate against innocent possession with the result that the imposition of the maximum sentence may be justified.'

The plea in mitigation of the accused consisted of a mere statement of his age and marital status. He did not give evidence so as to enable the Court to ascertain the role he played in being found in possession of the dangerous drugs. Neither did he state anything to that effect in his plea in mitigation. The weight of the dangerous drugs involved does not support the inference that he kept them for his own consumption. In the circumstances, bearing in mind the principles of sentencing that I have referred to and the fact that the accused is a first offender I convicted him and imposed a sentence of ten years imprisonment and ten strokes of the rotan.

[13] It is clear to me that the learned judge had applied the correct principle of sentencing when he imposed the sentence on the appellant. Before us, the appellant's counsel repeated the same mitigation that he did in the court below. No new issue was raised in respect of the mitigation. As such, I could not find any ground to disturb the sentence imposed by the learned judge.

[14] For the above reasons, we dismissed the appeal in respect of conviction and the sentence. We affirmed the conviction and the sentence imposed by the learned judge.

Appeal dissmissed. Conviction and sentence affirmed.

Reported by Andrew Christopher Simon